Evaluation of Evidence: Pre-Modern and Modern Approaches, by Mirjan Damaška, Cambridge, Cambridge University Press, 2019, viii + 152 pp. (including index), £80 (hardback), ISBN 978-1108497282

One of the major debates among evidence scholars is the extent to which there should be controls on the free evaluation of evidence, particularly in criminal cases. Should the trier of fact (the jury in a serious criminal case in England and Wales) have access to as much evidence as possible, or should there be barriers that regulate what evidence can be taken into account in reaching a decision? At least as it is traditionally conceived, the 'law of evidence' in Anglo-American legal systems is concerned to a large degree with principles concerning the admissibility of evidence, these principles being the tools relied on to perform such a regulatory function. The contemporary trend in England and Wales, it may be argued, has been towards facilitating the freer evaluation of evidence. For example, the Criminal Justice Act 2003 ushered in changes to the law which resulted in hearsay evidence becoming somewhat more readily admissible, and, arguably, evidence of the bad character of defendants becoming much more readily admissible. While such a trend has its advocates (see e.g. Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, London, 2001), some have urged caution about it (see e.g. F. Schauer, 'In Defense of Rule-Based Evidence Law—and Epistemology Too' (2008) 5 *Episteme* 295; A Stein, *Foundations of Evidence Law*, Oxford, 2005).

Mirjan R. Damaška has a formidable reputation as a comparative legal scholar with a particular interest in issues of evidence and procedure. His previous monographs—*The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, New Haven, 1986, and *Evidence Law Adrift*, New Haven, 1997—were both considered ground-breaking in their time and have continued to exert an influence on the shape of academic debates and on academic thinking generally. Damaška's third monograph, *Evaluation of Evidence: Pre-Modern and Modern Approaches*, the book under review, has therefore been eagerly anticipated.

Damaška's central mission in *Evaluation of Evidence* is to subject to close scrutiny the notion, which he perceives as having become generally accepted, that Roman-Canon law, with its technical rules, largely precluded free evaluation of evidence, and that it was only later that such evaluation became a feature of the law in Continental Europe. This is described by Damaška as 'the widespread belief that the value of evidence in the Roman-canon fact-finding scheme was established by applying legal proof rules mechanically, so that the judge acted as an automaton or an accountant of prescribed items of evidence. A well-known nineteenth-century French historian likened the judge to a harpsichord responding to keys that are struck' (p. 49). Exposing such an interpretation of history as insufficiently nuanced ('the epistemic views of the founders of the Roman-canon fact-finding scheme were not as distant from our [contemporary]

views as standard accounts suggest' (p. 46)) is the theme of this relatively short book, which consists of a prologue, eleven (often brief) chapters and an epilogue. What follows here is a selective look at the illustrations with which Damaška defends his thesis.

In Chapter 4 Damaška considers the 'two eyewitnesses' rule in the Roman-canon system, under which, according to the conventional wisdom, 'the judge was bound to impose blood punishment on the sworn testimony of two legally competent eyewitnesses even if he was unpersuaded by their assertions' (p. 59). In reality, however, Damaška finds (p. 63) that 'the testimony of legally competent witnesses was not credited unreflectively', and that

> the judge was required to watch carefully for signs of possible falsity in the assertions of witnesses. If he detected contradictions in a testimonial account, its accuracy came under a cloud and was unlikely to be credited. If a witness was caught lying on one point, his entire testimony could be rejected. But the judge was required not only to scrutinize the content of what witnesses asserted, but also to observe their demeanor for possible signs of falsity. He was expected to note, for example, if the witness blushed, stuttered, hesitated in answering questions, or in some other way produced signs of possible falsity.

Chapter 5 examines the rule in the Roman-canon system pursuant to which in-court confessions constituted full proof. The reality, however, according to Damaška, was that such confessions were not invariably accepted; in particular, judges had the power to reject coerced confessions which they found unreliable. What was required was that 'indubitable indications' of guilt—that is, evidence leading the judge to believe that the defendant was guilty—be compiled. If the defendant *then* confessed under torture, the judge's belief in guilt would effectively be confirmed.

Oral hearsay evidence is one of the issues considered in Chapter 7. While exceptions to the hearsay prohibition were readily available in the Roman-canon system, Damaška points out (p. 103) that, in reality,

> [t]he judge could use hearsay witnesses only if he was unable to reach the out-of-court declarant. And if a hearsay witness was unable to identify the declarant, his testimony was inadmissible. It is also important that the declarant was supposed to be a person of substance (*persona gravis*), and the credibility of the hearsay witness had to be 'above all exception'.

Conversely, hearsay evidence that was not covered by an exception could still, if credible, influence a court's decision, as 'judges could use knowledge acquired from forbidden hearsay in formulating questions to be addressed to legally competent witnesses, and evaluate their responses in light of this knowledge. And if forbidden hearsay made them doubt the testimony of these witnesses, especially those

relating incriminating information, judges would find them not to be "above all exception"' (p. 104).

Chapter 8 considers two devices which Damaška interprets as having been utilised to circumvent the effect of the stringent Roman-canon full proof standard. The first was extraordinary punishment (*poena extraordinaria*), taking the form of banishment, fines and corporal punishments, and available at the discretion of the judge when compelling incriminating evidence falling short of full proof was gathered against defendants accused of serious crimes (p. 106). The second was an intermediate judgment (*absolutio ab instantia*), lying in between an acquittal and a conviction and leaving the issue of criminal responsibility technically undetermined, but justifying placing the defendant under surveillance and also placing various restrictions on his activities (p. 111). Damaška draws attention to the contemporary Scottish 'not proven' verdict as an example of a form of intermediate judgment (p. 112 fn 21).

As a scholar of the contemporary law of evidence in common law jurisdictions generally and England and Wales in particular, with limited expertise in either legal history or Continental legal systems, I found *Evaluation of Evidence* informative and thought-provoking. It illustrates how closer examination may well reveal greater convergence between 'pre-modern' and 'modern' approaches to an issue than the conventional wisdom might have it. As Damaška vividly explains: 'In the end, both schemes produced fact-finding arrangements in which the evaluation of evidence is neither entirely bound by rules nor entirely free from them. The expectation to find a radical difference between the two fact-finding schemes in terms of the judge's degree of freedom in attributing value to evidence evaporates on closer inspection like mist on summer mornings' (p. 127). It is noted too that, '[o]n a continuum from an ideal type of factual inquiry governed by legal rules to an ideal of factual inquiry without them, both premodern and modern fact-finding arrangements arrived at positions not far from the middle' (p. 138).

More broadly, the book illustrates the triumph of deft judicial manoeuvring over the application of 'technical' rules where such application might yield a result considered unpalatable. Yet, as Damaška cautions, this does not suggest that rules of evidence should be abolished; rather, the conclusion it may point to 'is that if useful legal rules on the processing of evidence can be drafted, they should not be treated as a departure from but rather as movements toward an ideal' (p. 147).

Damaška's expression throughout the book is clear and elegant, even if at times a little florid. I do wonder whether the material might have been presented in a slightly more economical fashion; in particular, there is probably scope for the presentation of the discussions in the prologue and first three chapters, which set the scene for the more focused discussions in the rest of the book, to be tightened. Chapter 9, entitled 'Recapitulation', serves as a bridge to the final two chapters, which concern the contemporary position in Continental and common law systems,

but it is unclear whether the first half or so of this five-page chapter serves much useful purpose. The book is well produced and pleasing to the eye. The absence of a bibliography, however, is somewhat disappointing, given that it would be useful to have all the sources relied on by the author gathered in one place.

In sum, *Evaluation of Evidence* is a worthy successor to Damaška's earlier monographs, and a fine product of the several decades' gestation that Damaška alludes to in his Acknowledgements (p. viii). It will no doubt set the benchmark for the evaluation of scholarly writings on the general topic for the foreseeable future.

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